

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

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CRISTIE SULLIVAN,

Plaintiff,

vs.

CITY OF DEXTER, IOWA; MAYOR JERRY  
STILES, Both Individually and in his Official  
Capacity; and COUNCILMAN and MAYOR  
PRO TEM GREGG WAHMAN, Both in his  
Individual and Official Capacity,

Defendants.

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**No. 4:05-cv-114-JEG**

**ORDER ON MOTION  
TO REMAND**

This matter comes before the Court on Plaintiff's Motion to Remand and Defendants' Motion to Consolidate Cases. A hearing on the motions was held March 9, 2005. Plaintiff was represented by Roxanne Conlin, who appeared telephonically; Defendants were represented by Elizabeth Nigut and Lori Cole. The matter is fully briefed and ready for disposition.

**FACTUAL AND PROCEDURAL HISTORY**

On December 3, 2003, Plaintiff Cristie Sullivan ("Sullivan") filed a Petition in Dallas County District Court against the City of Dexter, Mayor Jerry Stiles, and Councilman and Mayor Pro Tem Gregg Wayman ("Defendants"), alleging the following seven causes of action based solely on Iowa law: (1) Conspiracy to

Interfere with Civil Rights under the Iowa Constitution and the Common Laws (All Defendants); (2) Intentional Infliction of Emotional Distress (All Defendants); (3) Defamation (Stiles); (4) Violation of Article I, Section 1 of the Constitution of the State of Iowa (All Defendants); (5) Violation of Article I, Section 6 of the Constitution of the State of Iowa (All Defendants); (6) Tortious Interference with Contract (All Defendants); and (7) Respondeat Superior (All Defendants). Sullivan amended her Petition, adding a claim for Negligent Hiring, Retention, and/or Supervision against the City of Dexter.<sup>1</sup>

On February 4, 2005, Defendants filed a Motion for Summary Judgment and a Motion to Continue Trial. On February 16, 2005, the court denied the motion to continue and a hearing on the motion for summary judgment was set for March 1, 2005, at 1:30 p.m. Plaintiff filed a resistance to the motion for summary judgment and a brief in support thereof. On March 1, 2005, Defendants removed this action to

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<sup>1</sup> On December 1, 2003, Sullivan filed a seven-count Complaint in this court against the same Defendants alleging (1) Equal Protection violation under 42 U.S.C. § 1983; (2) Equal Protection violation against Stiles and Wahman in their individual capacity pursuant to 42 U.S.C. § 1983; (3) Due Process violation against all defendants, 42 U.S.C. § 1983; (4) Due Process violation against Stiles and Wahman in their individual capacity, 42 U.S.C. § 1983; (5) Conspiracy to Interfere with Civil Rights in violation of 42 U.S.C. § 1985; (6) 42 U.S.C. § 1983 Procedural Due Process violation against all defendants; and (7) 42 U.S.C. § 1983 Procedural Due Process violation against Stiles and Wahman in their individual capacity.

federal court. Defendants assert the basis for removal jurisdiction was not revealed until Plaintiff filed her resistance to the motion for summary judgment, claiming for the first time, a violation to her right to *intracity* travel. Asserting that the intracity travel claim gave rise to federal-question jurisdiction, Defendants removed this action pursuant to 28 U.S.C. § 1446(b) (“§ 1446(b)”). Defendants then moved to consolidate this case with the parallel action that was pending before this Court.<sup>2</sup>

On March 1, 2005, Plaintiff filed the present Motion to Remand. She argues that citing federal case law in resistance to a motion for summary judgment on her constitutional state claim for freedom of intracity travel does not raise a federal question. Plaintiff further claims that the fact that the Iowa Supreme Court has not had the occasion to rule on the right to intracity travel does not make such a claim federal in nature. Plaintiff insists that her claims are founded on and arise under the laws and Constitution of the State of Iowa, and therefore this Court lacks subject matter jurisdiction. Plaintiff asserts removal was used for the sole and improper purpose of frustrating Plaintiff’s choice of forum and delaying trial. Plaintiff further asserts that because Defendants’ removal was improper, she should be awarded the costs and expenses incurred in bringing this motion, including reasonable attorney’s

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<sup>2</sup> Sullivan v. City of Dexter, Iowa, et al., No. 4:03-cv-40692.

fees. Defendants resist Plaintiff's motion, arguing that removal was proper because a claim of infringement on the right to travel necessarily arises under the commerce clause or privileges and immunities clause of the United States Constitution and constitutes a federal question.<sup>3</sup>

### **STANDARD FOR MOTION TO REMAND**

Title 28 U.S.C. § 1441 sets forth the conditions of removal and states in pertinent part as follows:

- (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
- (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(a), (b) (2000).

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<sup>3</sup> In response to a question from the Court at the hearing, Defendants' counsel conceded that "intra"city travel, by definition, is *not* interstate travel, and therefore would not in this instance fall under the provision of the Commerce Clause of the United States Constitution. U.S. Const. Art. I, § 8, cl.3.

Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, federal-question jurisdiction is required. The presence or absence of federal-question jurisdiction is governed by the ‘well-pleaded complaint rule,’ which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.

Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) (footnotes omitted) (citing Gully v. First Nat’l Bank, 299 U.S. 109, 112-113 (1936)).

“When a defendant removes an action to federal court, such defendant has the burden of showing that the federal court has jurisdiction.” Bor-Son Bldg. Corp. v. Heller, 572 F.2d 174, 182 n.13 (8th Cir. 1978) (citing McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178, 189 (1936)); Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. 990C80656 v. Amoco Oil Co., 883 F. Supp. 403, 407 (N.D. Iowa 1995). The Court must resolve all doubts about federal jurisdiction in favor of remand. In re Business Men’s Assurance Co. of Am., 992 F.2d 181, 183 (8th Cir. 1993); Amoco, 883 F. Supp. at 407. Only state court cases that could have originated in federal court may be removed. Caterpillar Inc. v. Williams, 482 U.S. at 392. Whether a case was properly removed is determined based on the plaintiff’s pleadings at the time of removal. Pullman Co. v. Jenkins, 305 U.S. 534, 537 (1939); Crosby v. Paul Hardeman, Inc., 414 F.2d 1, 3 (8th Cir. 1969).

“Federal district courts may exercise removal jurisdiction only where they would have had original jurisdiction had the suit initially been filed in federal court.” Krispin v. May Dept. Stores Co., 218 F.3d 919, 922 (8th Cir. 2000) (citing 28 U.S.C. § 1441(b)). “Removal based on federal question jurisdiction, as in this case, is generally governed by the ‘well-pleaded complaint’ rule, which provides that federal jurisdiction exists only where a federal question is presented on the face of the plaintiff’s properly pleaded complaint.” Krispin, 218 F.3d at 922. “If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” 28 U.S.C. § 1447(c).

“[A]n ‘independent corollary’ to the well-pleaded complaint rule is the further principle that ‘a plaintiff may not defeat removal by omitting to plead necessary federal questions.’” Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 475 (1998) (quoting Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 14 (1983)). Therefore, even though no federal question appears on the face of the Plaintiff’s complaint, if the Plaintiff has ‘artfully pleaded’ claims, the Court may uphold removal. Id. “The artful pleading doctrine allows removal where federal law completely preempts a plaintiff’s state-law claim.” Id.

## DISCUSSION

In the present case, removal was not based on allegations made in Plaintiff's petition. Instead, removal was based on an argument made by Plaintiff for the first time in resistance to Defendants' motion for summary judgment. Therein, Plaintiff asserted that her right to move about the City of Dexter was infringed by the Defendants.

In resistance to Plaintiff's motion to remand, Defendants argue that if any such right exists, it exists under the United States Constitution and not under the Iowa law.

### A. Federal Question

Relying on City of Panora v. Simmons, Defendants assert that a right to travel is prescribed by the commerce clause or the privilege and immunities clause of the United States Constitution, City of Panora v. Simmons, 445 N.W.2d 363, 367 (Iowa 1989), and therefore Plaintiff cannot assert the right is a state right by analogy because the Iowa Constitution does not contain any provision resembling the commerce clause or the privilege and immunities provision of the United States Constitution. Accordingly, Defendants assert Sullivan alleged a federal question and they properly removed this case to federal court.

In Simmons, the Iowa Supreme Court was faced with the question of whether a minor had a fundamental and unrestricted right to travel about the City of Panora.

Id. In discussing the fundamental right to travel, the Iowa Supreme Court noted that no such right was mentioned in the United States Constitution, but its origin was *probably* based on the commerce clause or the privileges and immunities clause of the same. Id.

The exact source of the fundamental right of interstate travel is said to be uncertain, *but it is probably based* on the commerce clause or the privilege and immunities provisions of the United States Constitution. L. Tribe, *American Constitutional Law* § 16-8, at 1455 n. 3 (2d ed. 1988). Travel which is not interstate is, of course, not specifically mentioned in the constitution, and its status as a fundamental right has been debated.

Id. (emphasis added). In answering the question of whether an ordinance can restrict the intracity travels of a minor, the court discussed United Supreme Court cases, as well as a case from the Colorado Supreme Court, and concluded that “a minor’s right of intracity travel is not a fundamental right for due process purposes, and the ordinance need not meet a strict scrutiny test.” Id. at 369.

It is Plaintiff’s contention that she is seeking recognition of a protected right of intracity travel under the Iowa Constitution. Contrary to Defendants’ assertions, the Court concludes Simmons does not set forth a pronouncement on such a right; Plaintiff is free to seek expansion of Iowa law in that area. It is not for this Court to determine if such a theory will prevail; rather, the question before the Court is whether the use of federal law as persuasive authority in advancing this state law

theory somehow created federal jurisdiction. The Court finds it does not. See, e.g., Scaccia v. Lemmie, 236 F. Supp. 2d 830, 839 (S.D. Ohio 2002) (“[T]he Court concludes that Plaintiff’s reference in a footnote to case law concerning Title VII does not require the conclusion that Plaintiff has asserted a claim under Title VII itself, and that Plaintiff herein has not brought a federal hostile work environment harassment claim.”); Strong v. Print U.S.A., Ltd., 230 F. Supp. 2d 798, 800 (N.D. Ohio 2002) (“The references to Title VII in Count Four do not transform the claim into a federal cause of action. They merely incorporate Title VII as one source of Ohio public policy.”). Using federal law by analogy, to assert a similar right under the Iowa Constitution does not create federal jurisdiction.<sup>4</sup>

## **B. Artful Pleading**

Defendants also advance the argument that Plaintiff tried to defeat removal through “artful pleading”. This argument is equally unpersuasive. The concept of “artful pleading” only applies when a plaintiff attempts to avoid the preemptive effect of a federal statute by pleading only state law claims. See, e.g., Harris v. Deaconess

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<sup>4</sup> The privileges and immunities clause of the Iowa Constitution is found in Article, Section 6: “All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.” Iowa Const. art. I, § 6.

Health Services Corp., 61 F. Supp. 2d 889, 892-93 (E.D. Mo. 1999) (“The artful pleading doctrine is limited to federal statutes which ‘so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal.’”) (quoting Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987)). Preemption does not apply to Plaintiff’s claim of a right to intracity travel; therefore, the artful pleading doctrine does not apply.

To uphold removal in the present case would require the Court to disregard Sullivan’s assertion that she attempts to expand Iowa law by way of her claim and tumble to the conclusion that her claim must necessarily arise under the United States Constitution. There is no basis for the Court to make this conclusion.

### **C. Costs and Attorney’s Fees**

Plaintiff seeks costs and attorney’s fees for improper removal pursuant to § 1447(c), which states in pertinent part, “An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” 28 U.S.C. § 1447(c). As the permissive language of the statute suggests, the award of fees is within the discretion of the Court.

An award of fees under § 1447(c) does not require a showing of bad faith, however, such an award is not appropriate if removal was fairly supportable. See, e.g., Daleske v. Fairfield Communities, Inc., 17 F.3d 321, 324 (10th Cir. 1994)

(finding the district court correctly denied fees under § 1447(c), reasoning the defendant acted in good faith and had a fair basis for removing the case); Lathigra v. British Airways PLC, 41 F.3d 535, 540 (9th Cir. 1994) (finding that an award of attorney's fees is inappropriate if removal was fairly supportable and there was no showing of bad faith); Moline Machinery, Ltd. v. Pillsbury Co., 259 F. Supp. 2d 892, 905-06 (D. Minn. 2003) (denying attorney's fees and costs reasoning "removal was sought in good faith, and that the basis for the removal was sufficiently compelling"); Wells' Dairy, Inc. v. Am. Indus. Refrigeration, Inc., 157 F. Supp. 2d 1018, 1043 (N.D. Iowa 2001) (denying attorney's fees and costs, reasoning removal "was not based on 'frivolous' grounds, but was instead based on a fairly supportable, if ultimately unsuccessful, argument and that [defendant] acted in good faith.").

The basis for removal in the present case was fairly supportable. The Court is satisfied that counsel for the parties simply viewed the posture of this case in fundamentally different ways. Counsel for the Defendants approached the issue from the premise that no colorable claim could be made on the basis of any provision in the Iowa Constitution, and the resulting conclusion that, despite Plaintiff's argument, the only possible claim was necessarily based upon federal law. Plaintiff, however, asserts a claim not upon clearly established Iowa law, but on an extension of the law based upon her urged interpretation of the Iowa Constitution. This posture creates a

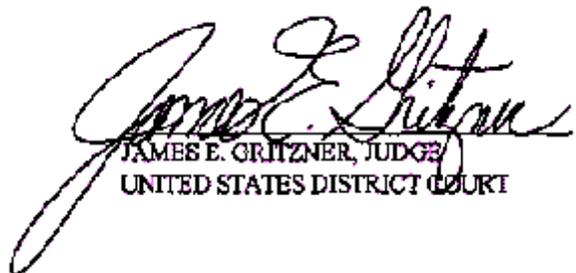
dispute that must be resolved but does not illustrate to this Court's satisfaction that Defendants' argument, though ultimately found to be incorrect, was not fairly supportable. On this record, there is no basis for the Court to conclude that the Defendants removed this action to cause delay or any another improper purpose. Therefore, the Court declines to award Sullivan fees and costs for seeking remand of this action.

### CONCLUSION

Based on the foregoing, the Court finds subject matter jurisdiction lacking. Plaintiff's Motion to Remand pursuant to 28 U.S.C. § 1447(c) (Clerk's No. 2) must be **granted**, and this case is **remanded** to the Iowa District Court for Dallas County for further proceedings. Defendants' Motion to Consolidate Cases (Clerk's No. 4) is **denied** as moot.<sup>5</sup>

**IT IS SO ORDERED.**

Dated this 11th day of March, 2005.



JAMES E. GRITZNER, JUDGE  
UNITED STATES DISTRICT COURT

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<sup>5</sup> At the time of the hearing in this matter, counsel for the Defendants advised the Court that the Defendants' Motion to Enjoin State Court Action in the parallel case (Clerk's No. 16 in Case No. 4:03-cv-40692) will be withdrawn. A separate order will be entered in that case indicating the motion is denied as moot.